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INFORMATION

For *William Napier* of *Tayock*, Againſt *John Irvine* of *Kincauſſy*.

BY Contract of Marriage betwixt *Napeir* of *Faſide* and his *Second* Wife; he is obliged to pay, and Deliver to the Children to be Procreat of the Marriage, the Sums following, if there be more than one the Sum of 10000 *merks*, whereof the half to the eldeſt Son, & the other half to be Equally Divided amongſt the Reſt; And if there be only Daughters, the ſame to be equally Divided; And if there be but one Child, the Sum of 8000 *merks*, and the ſaids Sums are thereby Provided to be payable at the Son's Ages of 21 years, and at the Daughtes Ages of 18 years, in caſe the Father ſhould Die before they attained to theſe Ages: And if the Father Lived till his Children were paſt theſe Ages, then the Proviſions were not payable till the nixt Term after the Father's Death.

The ſaid *Napier* of *Faſide* had only Two Daughters of that Marriage: And he becoming Inſolvent in his own Lifetime, Died before his Daughters attained to Age of 18 years.

After his Deceaſe, *Napier* of *Tayock* a lawful and onerous Creditor Purſued his Heirs, and Adjudged upon their Renunciation, and the eldeſt Daughter did likeways Purſue and Adjudge for 500 *merks* in the Name of *Kincauſſie* her Aſſigney; And her Diligence is founded upon her Mothers Contract of Marriage, and both Adjudications are within Year and Day.

There is now a Competition betwixt *Kincauſſie* and *Tayock* upon their reſpective Adjudications, *Tayock* Craves to be Preferred, in reſpect his Diligence is upon an onerous Debt, whereas *Kincauſſie*'s Adjudicauion is upon the Proviſion of a Child, and the Father becoming Inſolvent before that Proviſion was Payable, *Kincauſſie* can never Compete with him.

The Lords found, that the Childrens Proviſions could not Compete with the extraneous Creditors of the Father.

Kincauſſie reclaimed by a Bill, and obtained a Hearing; And the Point already Determined is again under the Lords Conſideration, whither they will adhere to, or alter their former Interlocutor.

The preciſe Queſtion is, whither the Proviſions of Contracts of Marriage, in Favours of Children can Compete with onerous Creditors who Contract *bona fide*.

As to which it is alledged for *Tayock*, that Proviſions in Favours of Children, are only Deſtinations of Succeſſion, whereby it is not Provided, or intended that Parents ſhould be under any Reſtraint as to the full, and free Adminiſtration of their own by Contracting of Debt, only that they may not do fraudulent, or gratuitous Deeds, eſpecially in Favours of Children of another Marriage in prejudice of ſuch Oblidgments and Proviſions.

It was Anſwered for *Kincauſſie*, that Contracts of Marriage were always reckoned moſt onerous and Favourable; Contracts and Diligence done thereupon, is as Effectual as upon any other Obligation; And there is no

Precedent where Creditors were preferred to Equal or prior Diligence upon Contracts of Marriage: But upon the contrair, the Children of *Preſtoun* were prefered to other Creditors conform to their Diligence, founded upon their Bonds of Proviſion, in Implement of the Oblidgments in their Mothers Contract; *And Kincauſſie* is in as good, or a better Caſe, becauſe he hath obtained a Decreet upon the Contract, and a Decreet is as legally Binding as any voluntar Obligation in Favours of a Child.

It was Replyed, that Contracts of Marriage are indeed onerous, Chiefly in ſo far as they are conceived in Favours of Wives, who are amongſt the moſt Favourable of Creditors; But Proviſions in favours of Children, are only Reckoned onerous in competition with gratuitous Deeds, or Proviſions in Favours of Children of a poſterior Marriage; For the true Deſign of Proviſions to Children is to Regulate their Parents Succeſſion, but not to Reſtrain them from Contracting of Debts: And if Creditors were not Secured againſt Children by their Parents Bonds, no man could ſafely Contract, and Commerce would be utterly Deſtroyed, For what ever mens Fortunes be, the Proviſions in favours of their Children are generally as Large; and Children are the moſt exact in Diligence, ſo that if onerous Creditors were not preferable to them, no man could be Secure.

2. As to the Practique of the Children of *Preſtoun*, there were many Specialities in that Caſe, for there was not only a Contract of Marriage, but expreſs Bonds to the Children *Nominatim*. 2. Theſe Bonds were not payable at the deceaſe of the Father, but at a preciſe Term, whereupon Diligence followed againſt him in his Life, ſo that they were not to be conſidered as Deſtinations of Succeſſion after his Death.

3. *Preſtoun* was neither repute, nor really inſolvent the time of granting theſe Bonds; for his own Eſtate was more than ſufficient to pay his own Debts, but he was broken by Cautionry, and when he granted the Bonds of Proviſion to his Children, the perſons for whom he was Cautioner were repute to be in an opulent Condition, ſo that the Proviſions in favours of his Children could never be reckoned fraudulent.

And as to the Parallel betwixt a Bond and Decreet, there is not the leaſt Parallel at all; for a Decreet can never ſignifie more than the Grounds and Warrands of it, if a Proviſion in a Contract of Marriage be no ſufficient Title, it is impoſſible that the Decreet founded upon it can become better, but a Proviſion in a Contract of Marriage, can be very much fortified by a Fathers Bond; for ſo long as the Father is in condition to grant a Bond gratuitouſly, there is no queſtion he may grant a Bond to a Child, and there is as little queſtion that when a man is ſolvent, or ſo repute, he may grant a Bond for any reaſonable or good Cauſe, even though the Cauſe be not legally Binding, it is ſufficient that there be no fraud, much more if there be a natural Obligation, beſide the granting of a Bond *Nominatim*, and payable at a preciſe day is a formal and true Debt, tho to a Child, which is far more effectual than a Proviſion in a Contract of Marriage to a Child unborn, when it is altogether uncertain, whether there ſhall be any of the Marriage.

And whereas it is pretended, that there is no Practique to clear this Caſe:

It is anſwered the queſtion hath been very ſeldom moved, and ſo there is little remarked upon it, yet 24 *January* 1677. *Graham* contra *Rome*, An Inhibition being uſed upon a Contract of Marriage againſt a Father, and a Decreet again his Heir; and thereupon an Adjudication, yet the Lords found a poſterior Creditor was preferable; ſeing there was no Bond granted to the Children *Nominatim*, but a general Proviſion before they were born, and it was found that not only the Proviſion to the eldeſt Son, but that in favours of the younger Children could not compete.

It was furder alledged for *Kincauſſy*, that Proviſions in favours of Children

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are of diverſe ſorts, ſometimes the ſame are conceived by way of Subſtitution at other times by way of Obligment to pay to Children certain Sums of Mony, and at certain Ages, and in this Contract the Obligment is to pay, which is a more firm and effectual Obligation, and it cannot be queſtioned, that a Father being obliged to pay a Sum to a Daughter, which is the caſe in hand, Diligence upon that Contract would be ſuſtained as a true and effectual Debt. 2. There is no prejudice to Creditors nor Commerce, for he that truſts upon a perſonal Bond takes his hazard of the Debitors Eſtate, and no more know what other Perſonal Bonds he may have granted than what Obligments are contained in his Contract of Marriage. 3, Neither is there any Difference betwixt a Bond of Proviſion *nominatim*, and an Obligment in a Contract to Children to be born, becauſe it is moſt certain that conditional Obligations after the Condition is purified, become as effectual and retrobinding as if they had been pure and ſimple from the beginning, and conſequently ſuch Contracts confirmed by Decreets are as Binding as Bonds of Proviſion. 4. As to the Practique, it thereby appears that Parties were allowed to be furder heard, ſo that nothing was finally determined.

It was replyed, Proviſions in favours of Children, are indeed of diverſe ſorts; ſome are by way of Subſtitution, in favours of Heirs of a Marriage, which requires Service, and is a Repreſentation: others are by way of Obligements to pay.

Again, Contracts containing Obligements to pay, are of diverſe ſorts, where Eſtates are provided to Heirs-male; or in caſe of Male-Iſſue by another Marriage, Proviſions are made in favours of Daughters, commonly payable at a certain age; And ſometimes Proviſions are made payable by the Parents to their Children, but not till the deceaſe of the Father; ſo that no Execution can ever paſs againſt him: And in effect, ſuch Proviſions are no better than Subſtitutions; becauſe they are only Deſtinations how the Parent thinks fit to divide his Eſtate after his own Death, but never to ſtraiten himſelf, or hurt his Creditors.

The preſent Contract is in the laſt caſe, and whatever might be pled in caſe of an obligement to pay to a Daughter of a Marriage, in caſe the Eſtate ſhould fall to an Heir male, That ſuch Proviſions are with regard and ſome proportion to the Mothers Tocher, and commonly Binding during the Fathers Lifetime, and may be the Foundation of Diligence againſt him; yet where Contracts can never be effectual againſt the Father the Contracter in his life, and are conceived to be payable at his Death; ſuch Obligements can never be interpreted to import any prejudice to lawful Creditors: And if the Lords ſhould affoord them the leaſt Encouragement; Contracts would be conſtantly framed in that Stile; For by that means the Parent is abſolute Maſter in his own life, and might inſnare Creditors and ruine Commerce: And therefore, what is not allowed to Parents in the uſual Stile by Obligements, to provide and ſecure to themſelves, and the Heirs of the Marriage, is not to be allowed in another Stile by an Obligement, to pay to the Bairns of the Marriage after their deceaſe, theſe Obligements are of the ſame Import and Effect in Law; and an Obligement to provide, is as binding and effectual, as an Obligement to pay where both are deferred to the Granters death.

And whereas it is alledged, that Creditors might be as well inſnared by perſonal Bonds, as by Contracts of Marriage: It is a great miſtake; for every man generally is obliged by his Contract, to provide the whole, or Bulk of his Eſtate to his Children, in one Stile or other, which is not binding or burdenſome upon himſelf, but regulates his Succeſſion. But a man may many ways know the condition of his Debitor as to onerous Debts: beſide, a Debitor lyes under no Temptation to grant Bonds, which may be the Foundation of Diligence againſt himſelf: but there lyes ſo great a Temptation for men to Favour their Children, that many who will not reſtrain their Expenſes to preſerve their Eſtate for them, would yet be glad that they could ſpend liberally upon

upon the Credit of it, and yet leave it to be affected by their Children preferably, or at leaſt equally, with lawful Creditors. And in plain Terms, if ſuch a Deciſion ſhould eſcape, no Creditor could poſſibly be ſecured againſt the Force of a Contract; And therefore this Point was never formerly pled, except in the fore-cited caſe of *Graham* and *Rome*.

And whereas it is alledged, that the foreſaid caſe was not finally Determined, but appointed to be further heard: The Lords would conſider, That an Inhibition was uſed in that caſe which is a great Speciality: For when a Father provides that Execution ſhall paſs againſt him, to the end that he may be effectually bound up; and when Execution hath accordingly paſt, and is to be ſeen upon Record, then Creditors need not be inſnared: But where a Father leaves himſelf free, and no Diligence is done, then Creditors can never be prejudged

The Lords may alſo remember in the late debate, betwixt the Children of the firſt and ſecond Marriage of *John Howat*, where a purſuit being intented upon the obligement of a Contract of Marriage, in favours of the Son of the firſt Marriage, againſt the Relict and Children of the ſecond. The Lords found, That the obligements of the firſt and ſecond Marriage were to be fulfilled in their Order, whereby the Proviſions to imploy a ſpecial Sum in the firſt Contract, were found preferable to the Proviſions of the ſecond; from whence *Thycck* argues, That if the Proviſion of the firſt Contract were preferable to the ſecond, much more would the Fathers onerous Debts be preferable to both, becauſe both Contracts being true Debts, and ſuch as might compete with extranious onerous Creditors, as *Kincauſſy* pretends: It plainly follows, that one of them could not be preferable to another, but either Party would have been preferable according to his diligence.

And whereas it is pretended, That an obligement in a Contract, is as good and effectual as a Bond of Proviſion to a Child *nominatim*, notwithſtanding that Contracts be before the Children be exiſting.

It is Replyed, There is a great difference, becauſe Bonds of Proviſion *nominatim*, granted by Parents not inſolvent, have alwayes been reckoned true and formal Debts, whereas obligements in Contracts are only Deſtinations of Succeſſion in Competition with Creditors; and albeit ſome conditional obligations after the exiſtence of the condition be reckoned equivalent to pure Obligations, yet others are not, as where the Obligation is granted to a perſon to be born, and to take effect in certain caſual events, relating to the perſon. There the uncertainty of the condition having a ſpecial relation to the exiſtence of the Creditors, during the dependence of the condition, there is no Creditor, for Debitor and Creditor are *correlata*, and therefore till the exiſtence of the condition, they can be reckoned no Creditors at all, and the Debts Contracted in the mean time ought firſt to be payed, and in this caſe, the condition of the Contract did not exiſt till after the Fathers death, becauſe the Mother ſurvived the Marriage, and the Children had not attained to the Age mentioned in the Contract, and then the Father twas inſolvent.

And whereas it was pretended, that it imports nothing, tho it ſhould be acknowledged, that *Tayock* ſhould be reckoned the firſt Creditor, becauſe Debts are not preferred by their dates, but by their diligence.

It is anſwered, That the Proviſions in favours of Children of a Marriage, being conditional and uncertain till the diſſolution of it, and all Creditors in the mean time, being reckoned anterior, the exiſtence of the Condition is reckoned the Date of the Obligation; and the Father being inſolvent when the Obligation begun to a Child, the Creditor is preferable. But the Ground upon which *Tayock* doth mainly Inſiſt, is, That the deſign of Contracts of Marriage, is not to bind up Parents from contracting Debt, nor to become a Snare to lawful Creditors, but only to exclude gratuitous Deeds, and eſpecially to regulat the Intereſts of Heirs of ſeveral Marriages.

In reſpect whereof, &c.